No. 89-7645

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIONISIO HERNANDEZ

Petitioner,

vs.

STATE OF NEW YORK

Respondent.

On Writ of Certiorari to the
Court of Appeals of New York

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Movants U.S.ENGLISH, Inc. and U.S.ENGLISH Foundation, Inc., District of Columbia non-profit corporations, respectfully move for leave to file the attached brief amici curiae in this case. Neither counsel responded to requests for permission to file this brief.

Movants have been the principal proponents of initiatives and legislative efforts to designate English as the official language of fifteen of the eighteen states which now have constitutional or statutory designations of an official language. In addition, Movants are involved in nationwide activities involving choice of language, including efforts to protect the rights of all Americans to have English as the language of government.

Movants are, therefore, uniquely suited to illustrate for the Court the potential ramifications of this case beyond those presented by the parties. A decision by this Court which equates language with national origin will harm Movants' efforts. Movants believe that their discussion of the effects of such a decision will aid the Court in determining its decision in this case.

Respectfully submitted,

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PROPOSED BRIEF AMICI CURIAE OF U.S.ENGLISH, INC. AND U.S.ENGLISH FOUNDATION, INC. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Because Amici Curiae are not certain whether the following question is clearly included within the questions presented in petitioner's brief, Amici respectfully suggest that Question 1 presented in this case fairly includes the following question:[1]

Whether the language spoken by a person can be equated, *per se*, with the person's national origin?

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1 *See, e.g.*, restatement in Petitioner's Brief, Pp. 20-21: "While there may be reason to challenge the credibility and the good faith of a prosecutor who relies on reasons like the one offered in this case, it is not necessary to do so. It is sufficient that this Court find that the proferred reasons are based on Spanish language ability and thus national origin. It is a *per se* violation of the [sic] *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] and the Fourteenth Amendment."

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INTEREST OF AMICI CURIAE

Amici U.S.ENGLISH, Inc. and U.S.ENGLISH Foundation, Inc. (together U.S.ENGLISH) are District of Columbia non-profit corporations. U.S.ENGLISH, Inc. is a social welfare action organization exempt from taxation under I.R.C. § 501(c)(4); U.S.ENGLISH Foundation, Inc. is a charitable and educational organization exempt from taxation under I.R.C. § 501(c)(3). Together amici have more than 350,000 members nationwide, with a Board of Advisors including former U.S. Senators S.I. Hayakawa, Eugene McCarthy and Barry Goldwater, and broadcaster Alistair Cooke.

Amici have two goals: to protect English as the official language of the United States; and to provide an opportunity for every American to learn English.

The interest of amici in this case arises from their on-going efforts to protect English as the official and common language of the United States and of the various States. Amici have been the principal proponents of initiatives and legislative efforts to designate English as the official language of fifteen of the eighteen states which now have constitutional or statutory designations of an official language. *See, e.g.*, Zall/Jimenez, *Official Use of English: Yes/No*, 74 A.B.A. J. 34-5 (1988) [hereinafter "Zall/Jimenez"]. Amici believe that "official language statutes ensure the preservation of English as our common language . . . without infringing individuals' rights." *Id.* at 34.

In addition, amici are involved in nationwide activities involving choice of language, including efforts to protect the rights of all Americans to have English as the language of government. Amici, for example, have participated in other language-related cases before this

Court. *See, e.g., Municipal Court v. Gutierrez*, ___ U.S. ___, 109 S.Ct. 1736 (1989); *Delgado v. Smith*, ___ U.S. ___, 109 S.Ct. 3242 (1989).

Amici are concerned that a decision by this Court which equates language with national origin will harm their efforts. Amici are in a unique position to inform the Court of the possible effects of such a decision. Amici, therefore, believe that they may be directly affected by this Court's decision in this case and that their discussion of the effects of such a decision will aid the Court in determining this case.

PRELIMINARY STATEMENT

U.S.ENGLISH opposes unlawful discrimination in any form, including unlawful discrimination based on language ability. U.S.ENGLISH supports this Court's efforts to eliminate unlawful discrimination from the judicial process.

As the Court noted, however, in *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803 (1990), "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Id.* at 811.

Petitioner seems to believe that in every situation the language a person speaks can be equated to that person's national origin.[2] Amici express no view on

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2 *See, e.g.,* Petitioner's Brief [hereinafter Pet. Br.] 6 ("Language based reasons are integrally linked to national origin. Therefore, the prosecutor's explanation was a *per se* violation of the Equal Protection Clause."); Pet. Br. 11 ("Because of the integral relationship between speaking Spanish and being Latino, a decision based on Spanish language is tantamount to a decision based on Latino national origin."); Pet. Br. 11-12 ("facially discriminatory reason and a *per se* violation of *Batson* [*vs. Kentucky,* 476 U.S. 79 (1986)] and the Fourteenth Amendment."); Pet. Br. 20; Pet. Br. 20-21; Pet. Br. 27.

whether, in this case, the prosecutor's rationale for striking potential jurors was based on national origin, but file this brief only to urge this Court to reject a general absolute rule equating language with national origin. Such an absolute "*per se*" equation would be without a basis in law or fact, and would be unworkable and unwise.

STATEMENT OF CONTEXT

Conflicts over language have been part of American politics since the founding of the country. D. Simpson, *The Politics Of American English, 1776-1850* (1986). Today eighteen states have constitutional provisions or statutes designating English as the official language.[3]

These "official language" laws are intended, in part, to limit governments' use of languages other than English for official activities. These laws are a reaction, in part, to a growing clamor for government activities and services in languages other than English. "It is not

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3 The States and the dates they enacted the designation are: Alabama: ALA. CONST. AMEND. 509 (1990); Arizona: ARIZ. CONST. ART. XXVIII (1988); Arkansas: ARK. STAT. ANN. 1-4-117 (1987); California: CAL. CONST. ART. III, § 6 (1986); Colorado: COLO. CONST. ART. II, § 30 (1988); Florida: FLA. CONST. ART. II. § 9 (1988); Georgia: 1986 Ga. Laws 529 (1986); Hawaii: HAWAII CONST. § 4 (1978); Illinois: ILL. REV. STAT. CH. 1, § 3005 (1969); Indiana: IND. CODE. CH. 10, § 1 (1984); Kentucky: KY. REV. STAT. § 2.013 (1984); Mississippi: MISS. CODE ANN. § 3-3-31 (1987); Nebraska: NEB. CONST. ART. I, § 27 (1920); North Carolina: N.C. GEN. STAT. CH. 145, § 11 (1987); North Dakota: N.D. CENT. CODE, § 54-02-13 (1987); South Carolina: S.C. CODE ANN. § 1-1-(696-698) (1987); Tennessee: TENN. CODE ANN. § 4-1-404 (1984); and Virginia: VA. CODE § 22.1-212.1 (1986).

government's role to maintain other languages and cultures; these valuable traditions can be best kept alive by private organizations and individuals, not by government." Zall/Jimenez, *supra*, at 34. *See also* Zall & Stein, *Legal Background and History of the English Language Movement* in D. Adams & D. Brink, *Perspectives On Official English* 62-63 (1990).

Debates about the language of government often reach the ballot; last June, 89% of Alabama's voters approved a new constitutional amendment declaring English the official language of that state. *Voters OK English Language Amendment,* Montgomery Advertiser, June 7, 1990, at A2, col. 2.

A portion of that battle also is being waged in American courts. Here are some examples of recent cases involving constitutional and statutory claims to specific rights or services based on the language a person speaks:

LANGUAGE OF GOVERNMENT ACTIVITIES:

Recently the U.S. District Court for the District of Arizona held the Arizona constitutional provision declaring English the official language of Arizona was void for violating government employees' asserted First Amendment rights to take official actions in languages other than English. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990). The decision, which the District Court later said was not binding on state courts, *Yniguez v. Mofford*, 130 F.R.D. 410, 416 (D. Ariz. 1990), may be appealed if either the initiative proponents or the Arizona Attorney General are allowed to intervene after judgment. *Arizonans for Official English v. Yniguez*, Nos. 90-15546 and 90-15581 (9th Cir. filed July 25, 1990).

Yniguez was the first case to find a constitutional right to governmental action in a language other than English. Other cases have held that neither civil service examinations nor official notices need to be in languages other than English. *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)(State had compelling interest in giving civil service examination only in English); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984)(official notices only in English not discriminatory); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(same); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, *cert. denied*, 459 U.S. 806 (1982)(same); *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974)(same); *Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904 (1975)(same).

LANGUAGE OF THE COURTROOM:

Language-related issues involving courtroom procedures are probably most acute in Puerto Rico, where the majority of the population does not speak English. *United States v. Ramos Colon*, 415 F. Supp. 459, 462 (D.P.R. 1976)(three-judge court). Yet, the United States District Court in Puerto Rico has consistently held that courtroom proceedings should be conducted in English. *Id.* at 465; *United States v. Valentine*, 288 F. Supp. 957, 963-64 (D.P.R. 1968). As the three-judge court in *Ramos Colon* said:

> [T]he use of English in its proceedings, and the language qualification requirements of jurors which follow as the logical consequences thereof, is not merely a question of convenience or practicality but is a constitutional imperative in that English being the constitutional language of the United States and of its Institutions, [citing to *Olivo* and *Carmona*] the use of said language in its proceedings ceases to be a question of adjective law but is a matter of constitutional substance. Leaving aside the almost insurmountable practical considerations . . . that would be prompted by any legislation that permitted non-English as an official language in constitutional proceedings, we express, without of course deciding at this time, serious reservations as to their possible validity as applied by any Article III court, even were such legislation to be uniformly applicable to all such courts throughout the Federal jurisdiction.

Ramos Colon, 415 F. Supp at 465-66. [4]

In *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), the Second Circuit held that a non-English speaking defendant had a Sixth Amendment right to a translator in a criminal case because otherwise he would not be "present at his own trial." 434 F.2d at 389. *But see United States v. Benmuhar,* 658 F.2d 14 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982)(Sixth Amendment permits English-language requirement for jurors); *Jara v. San Antonio Municipal Court*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 84 (1978), *cert. denied*, 439 U.S. 1067 (1979)(no constitutional right to appointed interpreters at public expense for represented litigants).

LANGUAGE OF EDUCATION:

In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court held that the San Francisco School Board's failure to provide at least some language assistance to non-English-speaking students violated those students' statutorily-protected civil rights. *But see Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978)(no right to bilingual/bicultural education).

LANGUAGE OF THE WORKPLACE:

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4 *See also* the extensive historical analysis in *Valentine*, 288 F. Supp. at 963-65.

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 2120 (1989), this Court failed, for lack of proof of disparate impact, to find discrimination despite an attack on, *inter alia,* an English-language hiring rule. *See also NLRB v. Precise Castings Inc.*, 915 F.2d 1160 (7th Cir. 1990)(union representation ballots and election materials need not be in languages other than English); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(requirement to speak English on the job not discriminatory as applied to bilingual person); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(same); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982)(upholding English-on-the-job rule for non-English-speaking truck drivers).

LANGUAGE OF POLITICAL ACTIVITIES:

Both the Tenth and Eleventh Circuits, in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1740 (1989), and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, ___ U.S.

___, 109 S.Ct. 3242 (1989), held that initiative petitions need not be printed in languages other than English in areas covered by the bilingual ballot provisions of the Voting Rights Act.

Petitioner here requests a *per se* rule equating the language spoken by a person with the person's national origin.[5] None of the cases listed above found such an equation, nor has this Court ever enunciated such an equation.[6]

Such an absolute rule, although here offered in the context of discrimination in jury selection, inevitably will affect the myriad language-choice conflicts faced by American courts. It would be difficult to fashion a national origin-based test for this case which would not be imported to all of the categories described above.

The danger which amici wish to bring to the attention of the Court is that announcing a definitive rule equating language with national origin will have ramifications well beyond this case, and should not be made in this case. Amici hope, for the reasons

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5 *See* Note 2.

6 Apparently for lack of other support, Petitioner continues what is a growing, but unfortunate trend in language-related cases by citing two vacated cases. Pet.Br. 11, 20, *quoting Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 109 S.Ct. 1736 (1989), and *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986), *vacated*, 484 U.S. 806 (1987). These vacated cases did find some equation of language-related rules and classifications and national origin. Similar citations to these cases have been made in briefs *and at least one opinion* in language-related cases. *See Asian Am. Business Group v. Pomona*, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989). Vacated cases have no legal effect and should not be relied upon or cited. *United States v. Munsingwear*, 340 U.S. 36, 41 (1950).

described below, that the Court will reject Petitioner's proposed *per se* rule as unfounded in law or fact, unworkable, and unwise.

SUMMARY OF ARGUMENT

Petitioner seeks, in part, an absolute rule equating a person's ability to speak a language with that person's national origin. Such a "*per se*" rule has no basis in law or fact, would be unworkable in practice, and would inject this Court into a highly political controversy over the proper role of government in choice of language.

Unfounded in Law or Fact

There is no support in the language, history or application of the Fourteenth Amendment to support a *per se* rule equating language and national origin. The ordinary definitions of national origin involve a person's ancestry, which may or may not reflect the language a person speaks. Thus, since language does not necessarily represent ancestry, a rule equating language and national origin would be both over- and under-inclusive.

In addition, language is not an immutable characteristic, like the place a person's ancestors were born. Language is more like alienage, which may be temporarily static, but which is ultimately mutable.

Unworkable

This case is not about only Spanish or Hispanics, but about the use of one language – English – as opposed to many languages. Hundreds of languages are spoken in this diverse country, and each would have an equivalent claim to special consideration.

Although Petitioner cites possible error by a court-appointed interpreter as a reason for ignoring language issues in a jury, the possibility of erroneous understanding by an untrained juror is both more likely and more ominous. Courtroom interpreting is a difficult art

and a juror who relies on his or her own interpretation at the expense of the official translation may have both undue and erroneous influence during jury deliberations.

Unwise

This Court should be reluctant to adopt a *per se* rule equating language and national origin to avoid influencing cases in contexts other than jury selection and to avoid involvement in on-going political controversies.

ARGUMENT

I. A *PER SE* RULE EQUATING ABILITY TO SPEAK A LANGUAGE WITH NATIONAL ORIGIN HAS NO BASIS IN LAW OR FACT, AND WOULD BE UNWORKABLE AND UNWISE.

A. A *Per Se* Rule Equating Language and National Origin Has No Basis in Law or Fact.

1. A Per Se Rule Equating Language and National Origin Has No Basis in Law.

Petitioner claims that a potential juror's ability to understand a language is identical to the potential juror's national origin under the Fourteenth Amendment. The language, history and interpretations of the Fourteenth Amendment and other federal laws do not support equating, *per se*, language and national origin.

Statutory Language:

The Fourteenth Amendment does not include the phrase "national origin." Nevertheless, there is no doubt that discrimination by States on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 n.5 (1987). "Distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

No Federal statute defines "national origin." This Court has noted that the legislative history concerning

the meaning of national origin, even under statutory law, is "quite meager." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see also Garcia*, 618 F.2d at 268 n. 2.

Legislative History:

Legislative history provides little support to a language-based definition of national origin. During debate on the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, Representative Roosevelt stated: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2,549 (1964).

This Court supports that assessment: "(t)he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88; *See also Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-3 (9th Cir. 1988)(Persons of Serbian national origin are members of a protected class under Title VII). "The terms 'national origin' and 'ancestry' were considered synonymous." *Espinoza*, 414 U.S. at 89.

Administrative Interpretations:

The Equal Employment Opportunity Commission, by regulation, has found that language minorities constitute a protected class under the employment discrimination statutes. 29 C.F.R. § 1606.1 (1990). Yet that regulation has never been tested in this Court, does not necessarily apply to the Fourteenth Amendment, and, under *Espinoza*, does not bind this Court. 414 U.S. at 94-95.

Judicial Interpretations:

This Court has never held that the language a person speaks can be equated, for Fourteenth Amendment purposes, with the person's national origin.[7] In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court did not review the Equal Protection question, deciding instead on grounds derived from statute and regulation. 414 U.S. at 566.

The Courts of Appeal also have never equated language with national origin under the Fourteenth Amendment:[8]

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). "A policy in-

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7 Petitioner cites *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), to support the equation of language and national origin, but that case involved intentional discrimination on the basis of ancestry rather than language, because the law there was designed "to affect [Chinese merchants] as distinguished from the rest of the community." 271 U.S. at 528.

8 One Court of Appeals did find a language-based right to an interpreter at criminal trials, but based the right on the Sixth Amendment. *Negron*, 434 F.2d at 389. Absent an interpreter, the Second Circuit found in *Negron*, the defendant would not be "present at his own trial."

volving an English requirement, without more, does not establish discrimination based on race or national origin." *An v. General Am. Life Ins. Co.*, 872 F.2d 426 (9th Cir. 1989)(table; text in WESTLAW); "The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin." *Garcia*, 618 F.2d at 270.[9]

A few cases indicate that if the language policy is a pretext for intentional discrimination or otherwise meets the new, more restrictive disparate impact standard, a language-related rule would violate national origin discrimination rules. *Wards Cove*, 490 U.S. at ____, 109 S. Ct. at 2120; *Jurado*, 813 F.2d at 1410-12 (English-on-the-air rule for bilingual broadcaster not racially motivated); *Vasquez*, 660 F.2d 686.

In addition to these cases explicitly discussing language and national origin discrimination, there are many cases (described in the Statement of Context) in which the courts implicitly rejected the equation of language and national origin by rejecting various national origin-based claims.

There is, therefore, no basis in the terms, history or interpretation of the Fourteenth Amendment to support petitioner's request for a *per se* rule equating the

9 The Fifth Circuit, in *Garcia*, did speculate that: "In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin. . ." 618 F.2d at 270. The Fifth Circuit, however, did not describe what those circumstances might be, limiting its holding only to rejecting the language/national origin equation for bilingual persons. In a later case, the Fifth Circuit upheld a similar English-on-the-job rule for a non-bilingual truck driver. *Vasquez*, 660 F.2d at 686.

language a person speaks and that person's national origin.

2. *A Per Se Rule Equating Language and National Origin Has No Basis in Fact.*

The language a person speaks does not correspond to the usual characteristics of national origin or of a suspect classification under the Fourteenth Amendment. Language classifications do not indicate with requisite specificity the country a person or a person's ancerstors came from. Nor is language an immutable characteristic, like a birthplace.

Spanish is spoken in many countries,[10] impairing a determination that the language itself determines, under *Espinoza*, "the country from which his or her ancestors came." 414 U.S. at 88. Thus, Hispanics are usually within a protected class not by virtue of language spoken, but by ancestry. *Hernandez v. Texas*, 347

10 At least 13 countries have Spanish as their official or national language. A. Blaustein & D. Epstein, *Resolving Language Conflicts: A Study Of The World's Constitutions* (1986).

U.S. 475, 479-80 (1954)(class of persons of Mexican descent wrongfully excluded from jury duty).

A *per se* rule equating language and national origin would be both over- and under-inclusive. Many Hispanics do not speak Spanish.[11] Many non-Hispanics speak Spanish.[12]

Nor is language an immutable characteristic, like "the country from which his or her ancestors came." *Espinoza* 414 U.S. at 88. Although, for some people, learning a new language may be a difficult or unfinished task, *Garcia v. Gloor*, 618 F.2d at 270, in that aspect language may be much like alienage – not statutorily protected.[13] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). Although alienage cannot be changed before qualification for naturalization, it can be changed eventually. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973)(Rehnquist, J., dissenting)(status as aliens can be changed by affirmative acts).

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11 The Rand Corporation reported in 1985 that by the second generation half the Hispanic immigrant children in California spoke English exclusively. Zall/Jimenez, *supra*, at 35.

12 The American Council of Teachers of Foreign Languages reported that 2,349,738 American high school students were taking Spanish language courses in 1985. Dandonoli, *Report on Foreign Language Enrollment in Public Secondary Schools, Fall 1985*, 50 Foreign Language Annals No. 5, 457-70. Contrary to popular belief, "people who got good grades in high school Spanish classes remembered much of the Spanish vocabulary up to 50 years after taking their last course." *College Classes Spur Lifelong Math Memory*, 138 Science News 375 (1990).

13 A new provision of the immigration law, 8 U.S.C. 1324b (1986), extends some employment protections to aliens.

Absent a basis in either law or fact, a request for a *per se* rule should be rejected. The Court should find alternatives to an absolute rule.

B. A *Per Se* Rule Equating Language and National Origin Is Unworkable.

1. This Case Is Not About English vs. Spanish, But About One Language vs. Many.

More than 140 languages are spoken in the United States. R. Porter, *Forked Tongue: Politics Of Bilingual Education* 5 (1990). Court interpreting services in 57 different languages (including signing for the hearing impaired) were used more than 46,000 times in federal district courts in Fiscal Year 1986. S. Berk-Seligson, *The Bilingual Courtroom* 5 (1990)(*quoting* the Administrative Office of the United States Courts).

Although much of the interpretation in federal courts is for Spanish-language testimony, *Id.*, courts continually adjudicate requests for rights in other languages. *Commonwealth v. Festa*, 369 Mass. 419, 341 N.E.2d 276 (1976), for example, involved Italian; *Wards Cove* involved Eskimo or Aleut languages; and *Lau* involved Chinese.

Many of those languages contain distinct dialects in which the same words mean different things. Berk-Seligson, *supra*, at 5 (citing Italian, Napolese and Sicilian as "different varieties of the same language.").

Some of these dialectical differences could be legally significant, such as the Spanish word "*guagua*", which means "baby" in Nicaragua or Chile, but "bus" in the Dominican Republic. *The Fine Art of Interpreting in a Miami Court*, N.Y. Times, May 8, 1984, at A15, col. 1.[14]

Petitioner's arguments on the connection between language and national origin apply equally to each of these languages, and to many of these dialects. Under *Espinoza*, each of those languages and dialects could "refer[] to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Dialects which are often more geographically specific, in fact, may be more likely to pinpoint country of ancestry than language alone.

The *per se* rule requested by Petitioner could lead to inquiries or special procedures in the courtroom for each of those hundreds of languages and dialects. *Batson* explicitly allowed consideration of the numerical burden a court would face in adopting a judicial theory: "'The number of our races and nationalities stands in the way of evolution of such a conception' of the demand of equal protection." *Batson*, 476 U.S. at 85, *quoting, Akins v. Texas*, 325 U.S. 398, 403 (1945).

The delays and costs of treating each language spoken in the United States as a potential ground for special treatment might be worthwhile if they were essential to prevent or eliminate discrimination, but, as shown above, language is an inaccurate surrogate for

14 The same article describes a convicted cocaine smuggler being removed from court after sentencing telling a judge "snore the mangoes", which the interpreter rendered as "That really takes the cake." *Id.*

national origin. Thus, no absolute rule equating language spoken to a person's national origin is appropriate and the costs and delays are not constitutionally required.

2. *A Per Se Rule Equating Language and National Origin Would Inevitably Complicate Courts' Already Difficult Language-related Problems.*

> THE COURT: If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the –
>
> DOROTHY KIM [a juror]: I understand the word *La Vado* – I thought it meant restroom. She translates it as bar.
>
> MS. IANSITI: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.
>
> DOROTHY KIM: You're an idiot.[15]

United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981).

The actual language-related courtroom problem highlighted in this case is a potential inconsistency in translation of testimony between the courtroom interpreter and a juror. Petitioner posits the possibility that the court-appointed interpreter might make a mistake which could be corrected by a juror. Pet. Br. 25-26. At least one court reported such a misinterpretation. *Seltzer v. Foley*, 502 F. Supp. 600, 603-4 (S.D.N.Y. 1980)(interpreter in magistrate's courtroom changed the motive of the accused without her knowledge).

15 Actually, the juror was incorrect; the interpretation was accurate. *Id.* at 663.

That possibility, however, is only one possible inconsistency between trained interpreter and juror.

As troubling as the possibility that the interpreter would err is the greater probability that the juror might err. Courtroom interpretation is a difficult art: "[T]here was a mistaken belief abroad that if one was bilingual he or she could interpret; but that just does not follow." *Seltzer*, 502 F. Supp. at 603, 607.[16] A 1985 report found that of 1,400 applicants, only 30 passed the federal certification test for Spanish language courtroom interpreters. *Problems Cited in Greater Use of Court Interpreters*, 16 Crim. Just. Newsl. 13, 2 (1985).

Even if a juror spoke the same language as the witness, differences in dialect or register[17] could also cause error, as with Ms. Kim's erroneous understanding of the name *La Vado* in *Perez*. 658 F.2d at 662-63.

16 In *Seltzer*, interpreters unsuccessfully challenged interpreter certification tests given by the Director of the Administrative Office of the United States Courts.

17 A linguistic "register" is a vocabulary and form of speech specific to a particular setting, like "legalese" in English. *Seltzer*, 502 F. Supp at 606-7 (courtroom English is not regular English).

A Mexican-dialect-speaking juror in a rape case, for example, who heard a Spanish-speaking witness say "*coger*" might believe that the witness has confessed intercourse, where the other jurors might be told by the official interpreter (who presumably would be aware of the appropriate Puerto Rican dialect) that the witness only "grabbed" the person. *The American Heritage Larousse Spanish Dictionary* 113 (1986). Thus a juror who would not rely on the official translation would perceive[18] a different, and more pernicious, element of the testimony.

If a juror believed a witness said something other than the official translation, correctly or not, that juror would likely have an undue influence during jury deliberations. Reuben, *Only An Elephant Never Forgets,* 17 Litigation 1, 51-2 (1990)(notes by two jurors might have undue influence). Jurors would be likely to lend extra weight to the bilingual juror's memory, even crediting it beyond the official transcript of testimony (because the juror was challenging the official translation as inaccurate). Courts could provide verbatim transcripts of the non-English testimony to bolster the official translation, but, if the difference is in word selection, the additional transcript would be wasted be-

18 Although clearly not conclusive, emerging scientific evidence indicates that persons who speak different dialects may *hear* differently. "When a Briton and a Californian listen to Beethoven's Fifth Symphony, they may not hear the same thing. New research indicates that people who speak different dialects of a language perceive tonal patterns in strikingly different ways, supporting long-standing speculations that speech characteristics influence the way people hear music." *Mother Tongue May Influence Musical Ear*, 138 Science News 343 (1990).

cause the word choice of translation was the issue anyway.

The Petitioner suggests that the juror who perceives a different word choice from that used by the interpreter simply pass a surreptitious note to the judge. Pet. Br. 25. Yet such a procedure – a juror passing a note to the judge and receiving an immediate response – would reinforce that juror's influence in the eyes of other jurors.

In addition, the behavior of jurors who believe that court interpreters are wrong can be very disruptive, as in *Perez*. 658 F.2d at 662-63. The juror in *Perez* called the interpreter "an idiot," and was subsequently excused from the jury. *Id.* The trial judge and the defendants found the episode disruptive and disturbing. *Id.*, at 663.

Petitioner seeks, in effect, bilingual jurors as a check on court-appointed interpreters. Pet. Br. 25-26. Yet petitioner has not shown that such a check is needed. Of the 46,000 times federal courts used interpretation services in Fiscal Year 1986, Berk-Seligson, *supra*, at 5, none apparently generated an appeal on language grounds.

The issue, therefore, is how a court should best handle issues of differences in interpretation between jurors and court-certified interpreters. Courts have traditionally held that only the official translation is evidence. *Festa*, 341 N.E.2d at 283. This rule has worked for many years and seems to satisfy the needs of courts and litigants.

A *per se* rule allowing the possibility of inconsistent interpretations in court and in the jury room would undercut the traditional rule and increase the possibility of disruption like that in *Perez*. Again, if risking the

possibility of inconsistent interpretations were essential to avoid discrimination, courts might decide the costs were worthwhile. Yet, in the absence of a legally-cognizable risk of interpreter error which could be remedied by petitioner's suggestion, it is unclear why courts should risk biasing jury deliberations.

C. A *Per Se* Rule Equating Language and National Origin Is Unwise.

This Court should be reluctant to adopt a *per se* rule equating language and national origin for two reasons: to avoid influencing cases in contexts other than jury selection and to avoid involvement in on-going political controversies. A misinterpreted phrase in an opinion from this Court could generate unintended controversies far beyond this case.

Such an absolute rule, although here offered in the context of discrimination in jury selection, inevitably will affect the myriad language-choice conflicts faced by American courts. Because most language-related cases implicate the Equal Protection clause, it would be difficult to fashion a national origin-based test for this case which would not be imported to all of the language-related cases described in the Statement of Context.

In addition, a decision of this Court which equated language choice with national origin inevitably would influence the on-going political and legislative efforts to determine the appropriate degree of governmental involvement in language choice. As noted in the Statement of Context, these debates are highly political.

This Court should be reluctant to enunciate an absolute constitutionally-based doctrine in such a controversial and political area. *Webster v. Reproductive*

Health Services, 488 U.S. 1003, 109 S. Ct. 3040, 3058 (1989); *Jean v. Nelson*, 472 U.S. 846 (1985).

Fortunately, there are alternatives for the Court. Petitioner's request could be denied altogether, or a decision in favor of Petitioner could be handed down without enunciating a broad *per se* rule (adopting instead, for example, a case-by-case analysis to determine whether the language-based claim is a cover for discrimination). If necessary, a rule could be crafted which would apply, by its terms, only to jury selection.

CONCLUSION

Because a *per se* rule equating the language a person speaks with the person's national origin has no basis in law or fact, would be unworkable and would be unwise, amici respectfully request this Court to reject that portion of Petitioner's case which requests such an absolute rule.

Respectfully Submitted,

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